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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

**JOHN V. GILLESPIE, SHERIFF,
PETITIONER,**

v.

**DIANE HELEN MANNES,
RESPONDENT.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a trial judge's dismissal of murder charges after a hung jury pursuant to a statute which authorizes dismissal "in furtherance of justice" constitute an implied acquittal which prohibits retrial under the federal double jeopardy clause?

2. Should a dismissal of murder charges after a hung jury be construed as an acquittal when the judge dismissing the charges had no legal authority to acquit?

3. Should a federal court on habeas corpus give deference to the state courts' interpretation of a state court order, i.e., that the dismissal order was not a finding of insufficiency of the evidence that would bar retrial?

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The District Attorney of the County of Ventura, on behalf of petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 22, 1992. The opinion affirmed the issuance of a writ of habeas corpus by the district court which prohibits retrial of respondent for murder.

OPINION BELOW

The only published opinion in this case is *Mannes v. Gillespie* (9th Cir. 1992) ____F.2d _____ (Slip Op., p. 6877). It is reproduced as Appendix A hereto.

JURISDICTION

The opinion of the Court of Appeals was issued on June 22, 1992. The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution, sections 1118.1 and 1385 of the California Penal Code, and rule 29 of the Federal Rules of Criminal Procedure are reproduced in Appendix N hereto.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The charges arise from a fatal collision that occurred on March 31, 1989. Respondent, Diane Helen Mannes, drove a Ford Bronco into five pedestrians on the northbound shoulder of Highway 101 at the Conejo grade, killing three of the pedestrians and injuring the other two. Respondent's blood-alcohol level two hours after the collision was .20% by weight.

Respondent had been arrested the night before the collision for driving under the influence of alcohol. Following that arrest, her fiance picked her up from jail, told her during a conversation of two and one-half hours about the dangers of driving under the influence, and elicited a promise that she not do it again.

B. THE FIRST INFORMATION

Respondent was charged in an information filed on June 29, 1989, in the Superior Court of the State of California, County of Ventura. She

was charged in Counts 1, 2 and 3 with murder (California Penal Code section 187(a)) of Darrin Scott Mullins, Joshua Daniel Oxenreider, and Jacob Eugene Boyd, respectively, while driving under the influence of alcohol. She was charged in Count 4 with driving under the influence causing injury to Jeffrey Botens (California Vehicle Code section 23153(a)). She was charged in Count 5 with driving with a blood-alcohol level of .10% or more causing injury to Jeffrey Botens (California Vehicle Code section 23153(b)). Sentencing enhancements were alleged as to Counts 4 and 5 for multiple victims, the additional alleged victim being Jeremy Lee Boyd (California Vehicle Code section 23182). An enhancement was alleged as to Count 5 for having a blood-alcohol level of .20% or more (California Vehicle code section 23206.1). All of the counts were alleged to have been committed on or about March 31, 1989.

C. THE JURY TRIAL

During the trial, respondent made two motions for acquittal pursuant to California Penal Code section 1118.1. The first motion was on November 7, 1989, after the prosecution presented its case-in-chief. The second motion was on November 9, 1989, after all the evidence had been presented and both sides had rested. The trial judge found that there was sufficient evidence to sustain a jury verdict of guilty and denied both motions. (These rulings are reproduced in Appendices B and C.)

On November 17, 1989, the jury found respondent guilty of Counts 4 and 5 (driving under the influence causing injury and driving with a blood-alcohol level over .10% causing injury) and found true the multiple victim allegation. The jury was deadlocked on the murder counts (Counts 1, 2, and 3) with seven of the twelve jurors voting guilty. The court declared a mistrial as to the murder counts and discharged the jury.

On February 2, 1990, the superior court sentenced respondent to four years in state prison for the Vehicle Code violations (Counts 4 and

5) less credit for time served of 297 actual days and 149 days conduct credit.

D. MURDER CHARGES DISMISSED

Respondent filed a Motion to Dismiss by the Court in Furtherance of Justice, Pursuant to Penal Code § 1385. The motion was granted and the murder charges dismissed pursuant to Penal Code section 1385 on December 1, 1989. The court issued a written order explaining its reasons (attached hereto as Appendix D). In that order, the court recognized that the district attorney could refile the murder charges and retry respondent.

E. REFILED COMPLAINT

On December 1, 1989, the district attorney refiled the murder charges in municipal court in a felony complaint. Respondent filed a motion to dismiss based on double jeopardy grounds. Both sides filed points and authorities discussing the interpretation of the dismissal order under both state and federal law. On January 10, 1990, after oral argument by both sides, the municipal court denied respondent's motion to dismiss. (Appendix E.) The court found that the trial judge did not make a finding as a matter of law that there was insufficient evidence. On June 13, 1990, the preliminary hearing was held in municipal court, and respondent was held to answer for three counts of murder.

F. STATE COURT WRITS DENIED

On February 16, 1990, respondent filed a petition for writ of mandate in superior court challenging the refusal of the municipal court to dismiss the refiled murder charges. On March 16, 1990, the petition was denied. (Appendix F.) Respondent then filed a petition for writ of

mandate in the Court of Appeal of the State of California, Second Appellate District, Division 6, which was denied on March 29, 1990. (Appendix G.) Respondent then filed a petition for writ of mandate in the Supreme Court of California. The state Supreme Court treated the petition as a petition for review, and denied it on May 23, 1990. (Appendix H.)

G. THE SECOND INFORMATION

The second Information was filed in superior court on June 21, 1990, alleging three counts of murder. On June 21, 1990, respondent entered pleas of not guilty and once in jeopardy. On June 27, 1990, the superior court struck the plea of once in jeopardy.

H. FEDERAL HABEAS PETITION

Respondent filed a petition for writ of habeas corpus in the United States District Court, Central District of California. The District Court had subject matter jurisdiction to issue a writ of habeas corpus for a person in state custody pursuant to 28 U.S.C. section 2254. Over opposition of the district attorney, the Honorable A. Wallace Tashima, United States District Judge, ordered all state court proceedings stayed pending resolution of the writ. The Honorable Volney V. Brown, Jr., United States Magistrate Judge, issued his Report and Recommendation recommending that a petition for writ of habeas corpus be issued to prohibit retrial of defendant for murder. (Appendix I.) The district attorney filed objections to the report and recommendation. The Magistrate Judge then issued a Final Report affirming his earlier recommendation. (Appendix J.) The District Court Judge approved the report and issued a writ of habeas corpus "forever prohibiting the retrial of petitioner for the murder of Darrin Scott Mullins, Joshua Daniel Oxenreider and/or Jacob Eugene Boyd." (Appendices K and L.)

The district attorney filed a notice of motion to amend judgment and for rehearing. The district court denied the motions without hearing. (Appendix M.)

I. APPEAL TO NINTH CIRCUIT

The district attorney appealed to the United States Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. section 2253. On March 5, 1991, Judge Tashima granted the district attorney's application to stay the state court proceedings pending appeal.

On June 22, 1992, the Court of Appeals issued its opinion, certified for publication, affirming the District Court's issuance of the writ of habeas corpus. (Appendix A.) The court rejected our argument that the District Court should have abstained from interfering with the pending state court proceedings. On the merits, the court treated the trial judge's dismissal as an acquittal which, under the Double Jeopardy Clause, barred retrial. The court rejected the municipal court's interpretation that the dismissal ruling was not "a finding as a matter of law that there was insufficient evidence." (Slip op., p. 6886.) Although the trial court had specifically ruled that the charges could be refiled and the defendant retried, the Court of Appeals ruled that "whether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of a dismissal under state law . . ." (Slip op., p. 6888.) Finally, the court discounted the trial court's denial of the two acquittal motions by speculating that the trial judge must have reconsidered these rulings. (Slip op., pp. 6887-6888, fn. 5.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

THE DISMISSAL OF CHARGES FOLLOWING A HUNG JURY DID NOT CONSTITUTE AN IMPLIED ACQUITTAL PROHIBITING RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE

A. RETRIAL IS PERMITTED WHERE THERE IS NO FINDING OF INSUFFICIENT EVIDENCE AS A MATTER OF LAW

Retrials are permitted upon "failure of a jury to agree on a verdict." *Green v. United States* (1957) 355 U.S. 184, 188. In *People v. Lo Cigno* (1965) 237 Cal.App.2d 470, 474, 46 Cal.Rptr. 918, the court held that the policy against retrials described in *Green* "does not apply to prevent a retrial of a defendant . . . after a mistrial has been declared on account of the inability of the jury to reach a verdict. Defendant is no worse off for having been tried upon a second indictment rather than retried upon the first." Citing California Penal Code section 1387, the court noted, "It is well established that the dismissal of a felony prosecution does not operate as a bar to a new prosecution for the same offense." *Id.* at p. 472.

California Penal Code section 1387 permits a dismissed felony charge to be refiled. Case law explains that a dismissal will be considered to be an implied acquittal barring retrial only if the court concludes that the evidence was insufficient *as a matter of law.*

In *Hudson v. Louisiana* (1981) 450 U.S. 40, the trial court granted a new trial after the jury returned a verdict of guilty. In concluding that retrial was prohibited, the Supreme Court relied upon the fact that "[t]he trial judge granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a '13th juror,' would have decided it differently . . .." *Id.* at p. 44. The court in *Hudson* distinguished the situation in which a new trial is granted by a judge who

entertained personal doubts about the verdict employing a "13th juror" standard. *Id.* at p. 45 and n. 5.

Similarly, in *Burks v. United States* (1978) 437 U.S. 1, 17, the court held that a finding that the evidence is legally insufficient is based on the standard of review employed on appeal, i.e., whether there is "substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." Appellate reversal is "confined to cases where the prosecution's failure is clear." *Ibid.* That is *not* this case!

In the present case, the trial court dismissed the information pursuant to California Penal Code section 1385, which authorizes dismissal "in furtherance of justice." This broad discretionary standard is similar to the "13th juror" standard discussed in *Hudson.*

There is little authority in California to explain the standard to be employed in deciding after a hung jury whether the case should be reset for trial or dismissed. California Penal Code section 1141 provides only that "the cause may be again tried." *People v. Blalock* (1960) 53 Cal.2d 798, 802, 3 Cal.Rptr. 137, 349 P.2d 953, explains only that "the trial court shall determine in the cases specified whether or not the defendant shall be tried again." *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505, 72 Cal.Rptr. 330, 446 P.2d 138, discusses the standard to be employed in a dismissal in analogous circumstances:

> A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial.

Thus, the decision to dismiss the present case involved balancing a number of factors, not limited to whether the trial judge felt that the case had been or could be proven.

In *People v. Veitch* (1982) 128 Cal.App.3d 460, 466, 180 Cal.Rptr. 412, the court contrasted an acquittal with a ruling employing a broader discretionary standard. The court held that an acquittal by the trial judge under California Penal Code section 1118.1 during the course of a jury trial bars any other prosecution for the same offense. The court noted:

> The test to be applied by a trial court in deciding a section 1118.1 motion is the "same test applied by an appellate court in reviewing a conviction: whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."

Ibid.

In contrast, the court held that in ruling on a new trial motion, the trial court "is under the duty to give the defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict. [Citation.] If the trial court grants a new trial under this motion, the decision is not an acquittal and is not a bar to retrial . . ." *Id.* at p. 467. Retrial is barred only where "'the State has failed as a matter of law to prove its case,' not when a 'new trial [is] ordered by a trial judge acting as a "13th juror".'" *Ibid.*

In the present case, the trial court had considerable discretion to weigh the evidence in ruling on the motion to dismiss. The court could exercise at least as much independent judgment as it would have in a new trial motion. The court did not find *as a matter of law* that the evidence was insufficient. Thus, retrial should not have been barred under the Double Jeopardy Clause.

The Court of Appeals relies in part upon *Tibbs v. Florida* (1982) 457 U.S. 31. (Slip op., pp. 6886-6887.) *Tibbs* quoted *Burks v. United States*, *supra*, 437 U.S. at p. 16, which explained that "legally insufficient" evidence "means that the government's case was so lacking that it should not have even been *submitted* to the jury." As discussed below, the trial court in the present case made the contrary determination by denying the two motions for acquittal during trial.

The court in *Tibbs* noted, "A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause." 457 U.S. at p. 42. The court continued in footnote 17, "Our decisions also make clear that disagreements among jurors or judges do not themselves create a reasonable doubt of guilt." Here, seven of the jurors voted for guilt.

Tibbs permits retrial when the conviction is reversed because the "interests of justice" require a new trial, rather than because of legal insufficiency of the evidence. *Id.* at pp. 46-47. The dismissal in the present case was pursuant to Penal Code section 1385, subdivision (a), which authorizes dismissal "in furtherance of justice." Because that legal standard is almost identical to the "interests of justice" standard in *Tibbs*, retrial is permitted.

The present case is on all fours with *People v. James* (1980) 102 Cal.App.3d 108, 162 Cal.Rptr. 263. In *James*, the jury found the defendant guilty of arson, but deadlocked on a murder charge. The trial court dismissed the murder charge pursuant to California Penal Code section 1385, stating:

> [T]hat in the Court's opinion it would be impossible to get a verdict of either guilty or not guilty because of the legal issues of specific intent, murder felony rule with a general intent crime, and the even split of the psychiatric testimony, the Court feels that it would be impossible to get a verdict in this case . . .

102 Cal.App.3d at p. 110.

The trial court also found that it "would have a reasonable doubt itself if he had to try the case without the jury on the issue of murder, Count 1." *Ibid.*

The prosecution in *James* subsequently refiled the murder count, and the defendant entered a plea of "once in jeopardy." The trial court held that the plea was valid and dismissed the matter pursuant to Penal Code section 1385. In reversing the dismissal, the Court of Appeal observed:

> It is well settled that "a retrial of a count on which the jury fails to agree is not 'another prosecution' within the meaning of Penal Code section 1023, and hence is not barred by the double jeopardy doctrine." [Citations.] . . . Generally, a defendant may be retried until "complete and final disposition is made of, all charges pleaded."

Id. at p. 111.

James' principal contention was that a dismissal under Penal Code section 1385 placed him "once in jeopardy." The court relied upon Penal Code section 1387, holding that the dismissal did not bar further prosecution. "Here the charge was only dismissed once under section 1385 prior to the filing of the present action. Under section 1387 one dismissal is not a bar to further prosecution." *Id.* at p. 113. *James* was disapproved in *People v. Smith* (1983) 33 Cal.3d 596, 601, fn. 3, 189 Cal. Rptr. 862, 659 P.2d 1152, only to the extent that the court in *James* considered the merits before determining whether the prosecution had a right to appeal.

The *James* case is virtually identical to the case at bar. Not only did the jury deadlock on one of the counts, and the trial judge dismiss the count under section 1385, but the trial judge in *James* also stated that in his opinion, it would be impossible for a second jury to return a verdict, and stated that he had a reasonable doubt as to the defendant's guilt. As in *James*, the facts of the present case did not justify an order precluding retrial.

B. THE DENIAL OF THE ACQUITTAL MOTIONS PRECLUDE HABEAS CORPUS RELIEF

The trial judge made two rulings which employed the appellate standard of review, and found the evidence *sufficient* under that standard. The court denied a motion for acquittal under California Penal Code section 1118.1 at the end of the prosecution's case, and again at the end of all of the evidence. By its terms, section 1118.1 requires a judgment of acquittal if "the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

The test in deciding a section 1118.1 motion is "whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." *People v. Trevino* (1985) 39 Cal.3d 667, 695, 217 Cal.Rptr. 652, 704 P.2d 719. In denying the section 1118.1 motions in the present case, the trial court found that the evidence was legally sufficient to sustain a conviction on appeal.

The Court of Appeals attempts to discount the denials of the acquittal motions by suggesting that the trial judge may have reconsidered his rulings. (Slip op., pp. 6887-6888, fn. 5.) But there is nothing in the dismissal order or elsewhere in the record to support a conclusion that the trial judge reconsidered his earlier rulings or believed that they were erroneous. There is no justification for the Court of Appeals' assumption that the trial judge changed his opinion or reversed his rulings sub silentio. Instead, the record demonstrates that the trial judge made subsequent rulings on different legal issues employing the different legal standards which properly apply to each.

In *People v. Trevino*, *supra*, the trial court denied the 1118.1 motions, but granted a new trial based on insufficiency of the evidence. In granting the new trial, the trial court stated that the evidence was "insufficient as a matter of law." *Id.* at p. 694. The California Supreme Court reasoned that if there had been sufficient evidence to support the conviction on appeal (the 1118.1 standard), "then all of the trial court's rulings would be correct, and the reasons given for granting the new trial

could be safely ignored." *Id.* at p. 696. However, if the evidence was insufficient as a matter of law, the 1118.1 motion should have been granted, and retrial was therefore prohibited. *Id.* at pp. 694-699. The court employed the standard of *Hudson v. Louisiana, supra*, i.e., that retrial is barred where "the evidence was insufficient as a matter of law." 39 Cal.3d. at p. 699.

Again, in the present case, the trial court specifically found that the evidence was sufficient as a matter of law in denying the motions pursuant to section 1118.1. These rulings are presumed to be correct and the burden would be on the party seeking habeas corpus relief to establish otherwise. 28 U.S.C. § 2254(d); *Austad v. Risley* (9th Cir. 1985) 761 F.2d 1348, 1355, fn. 4, cert. denied, 474 U.S. 856. Respondent herein has made no showing on habeas corpus that those rulings were incorrect. Because the evidence is sufficient as a matter of law, the comments given by the court regarding the sufficiency of the evidence at the time the case was dismissed can be "safely ignored" as in *People v. Trevino.*

C. THE INTENT OF THE TRIAL JUDGE SHOULD HAVE BEEN CONSIDERED

In making its ruling, the trial court made it clear that it did not intend to acquit respondent and bar retrial. The court noted that "this dismissal does not prevent the refiling of these murder charges — and a new trial."

The court's recognition that retrial would be permitted is significant. In *Lee v. United States* (1977) 432 U.S. 23, the defendant was charged with theft in federal court. A court trial began and the prosecution gave its opening statement. The defense then moved to dismiss the information as deficient on its face for failing to allege knowledge or intent. The court denied the motion, subject to later reconsideration, and heard the evidence in the case. The court then granted the motion on the original grounds, but made it clear that the evidence at trial was sufficient to convict. *Id.* at p. 26. The Supreme

Court held that a second prosecution on a new indictment was not barred by double jeopardy. The court held that the "critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged." *Id.* at p. 30. The court concluded that the dismissal was indistinguishable from a mistrial for jeopardy purposes because there was "little doubt that the court granted the motion to dismiss in this case in contemplation of just such a second prosecution." *Id.* at pp. 30-31.

In *United States v. Weinstein* (2nd Cir. 1971) 452 F.2d 704, cert. denied, 406 U.S. 917, the federal district court judge dismissed the case after a guilty verdict and after entering judgment. The trial judge relied upon his opinion that the testimony was incredible. *Id.* at p. 707. The trial judge stated that "a new trial would not serve any useful purpose because I believe that the government has presented this evidence it now has as forcibly as it could be presented to this jury. I do not believe that a retrial would serve any purpose at all . . ." *Id.* at p. 708.

The Court of Appeals in *Weinstein* held that the dismissal could not be characterized as an acquittal under Federal Rule of Criminal Procedure 29 because it followed entry of judgment, and because "to characterize the judge's order dismissing the indictment as one of acquittal would be to attribute to him a purpose he repeatedly and rightly disclaimed." *Id.* at p. 713. The court recognized:

> Beyond that the judge was entirely correct in acknowledging that he had no "right" to direct acquittal because of disbelief of the prosecution's witness, even though before entering judgment of conviction he had the "power" to do so. F.R.Cr. P. 29(a), which abolished motions for directed verdicts and substituted motions for judgment of acquittal, directs the granting of such motions "if the evidence is insufficient to sustain a conviction . . ."

Ibid.

Weinstein is relevant for three reasons. First, it recognizes that the trial court's opinion of insufficiency of the evidence is an acquittal only if the evidence is insufficient to sustain a conviction on appeal (i.e., insufficient as a matter of law), and not if based on its own weighing of the evidence. In the present case, the court found the evidence sufficient as a matter of law by denying the acquittal motions under Penal Code section 1118.1. Second, *Weinstein* refused to characterize a dismissal as an acquittal where the court disclaimed the intent to acquit. In the present case, the court disclaimed such intent by noting that the case could be refiled and retried. Third, as discussed in the next section, the court in *Weinstein* refused to recognize an order the court had no jurisdiction to make.

II.

THE DISMISSAL ORDER SHOULD NOT BE CONSTRUED AS AN ACQUITTAL BECAUSE THE TRIAL JUDGE HAD NO LEGAL AUTHORITY TO ACQUIT AFTER A HUNG JURY

In *United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, the trial judge granted the defendant's motion for judgment of acquittal following discharge of a deadlocked jury. Federal law provides that such motions may be made within seven days after a jury is discharged. Federal Rule of Criminal Procedure 29 is entitled Motion for Judgment of Acquittal, and is reproduced in Appendix N. The determinative issue in *Martin Linen* was "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, or some or all of the factual elements of the offense charged." *Id.* at p. 571. The Supreme Court concluded that the judgments of the trial court were acquittals in substance as well as in form, barring appeal under the double jeopardy clause of the Fifth Amendment. *Id.* at p. 572. The Supreme Court also relied upon the statements of the trial court that "the Government has failed to prove the material allegations beyond a reasonable doubt" and that "defendant should be found 'not guilty.'" *Id.* at p. 572. The court held that "Rule 29 merely replaces the directed-verdict mechanism . . . and accords the federal trial judge greater flexibility in timing his

judgment of acquittal . . ." *Id.* at p. 573. The court at p. 575 distinguished *United States v. Sanford* (1976) 429 U.S. 14, which permits retrial after a hung jury and dismissal.

Rule 29 does not apply in California state court cases, and there is no California equivalent which allows acquittal after a guilty verdict. In *People v. Superior Court (Jonsson)* (1966) 240 Cal.App.2d 90, 49 Cal.Rptr. 365, the court held that the trial court has no authority to enter a judgment of acquittal notwithstanding a verdict of guilty. (*Jonsson* was disapproved in *People v. Superior Court (Howard)*, *supra*, 69 Cal.2d at p. 501, on the issue of the right of the prosecution to seek mandamus relief.)

Unlike an acquittal under Rule 29, a dismissal pursuant to Penal Code section 1385 does not resolve any factual elements of the crime, but merely reflects the court's conclusion that dismissal would be "in furtherance of justice." The dismissal in the present case is thus not equivalent to the acquittals in the federal cases under Rule 29. Unlike *Martin Linen*, the present case does not involve the court placing the wrong "label" on its ruling. If the dismissal was not a dismissal, then what was it? Clearly, the court properly characterized its ruling as a dismissal.

In *United States v. Weinstein, supra*, the court refused to characterize a dismissal following entry of judgment as an acquittal because the trial judge had no jurisdiction under Rule 29 to acquit at that stage of the proceedings. In the present case as well, the trial judge had no authority to acquit after discharging the jury. The Court of Appeals in the present case errs in treating the dismissal as an acquittal when the trial court expressed no intent to acquit and had no legal authority to acquit. Federal courts should not recharacterize state court orders as orders the court had no jurisdiction to make.

III.

FEDERAL HABEAS COURTS SHOULD GIVE DEFERENCE TO STATE COURTS' INTERPRETATIONS

Federal courts owe respect to the states and should not "undermine the State's interest in enforcing its laws." *Coleman v. Thompson* (1991) 501 U.S. ____, 115 L.Ed. 2d 640, 654, 656, 111 St.Ct. 2546, 2552, 2554, reh. denied, 115 L.Ed.2d 1109, 112 S.Ct. 27.

In *Wright v. West* (1992) 505 U.S. ____, 120 L.Ed.2d 225, 112 S.Ct. 2482, this Court discussed the standard of review a federal court should employ on habeas corpus from a state court judgment. The court noted that habeas review of state court judgments "'entails significant costs.'" 120 L.Ed.2d at p. 239, 112 S.Ct. at p. 2491. The court quoted from *Duckworth v. Eagan* (1989) 492 U.S. 195, 210 (O'Connor, J., concurring) (quoting *Harris v. Reed* (1989) 489 U.S. 255, 282 (Kennedy, J., dissenting)):

> Among other things, "'[i]t disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"

The court in *Wright v. West* considered whether deference should be given to the state court for mixed constitutional questions and whether "a habeas judge need not—and indeed may not— 'shut his eyes' entirely to state-court applications of law to fact." 120 L.Ed.2d at p. 240, 112 S.Ct. at p. 2491. However, the court declined to resolve these "far-reaching issues" because the evidence supported the conviction under any standard. 120 L.Ed.2d at p. 240, 112 S.Ct. at p. 2492.

It is appropriate in the present case to resolve the issue of deference on mixed constitutional questions. The Court in the present case should answer the question left unanswered in *Wright v. West*.

The dismissal order in the present case is ambiguous; whether or not it constitutes an implied acquittal precluding retrial depends upon the application of the Double Jeopardy Clause to the dismissal order in the context of the other orders in the case and California statutory provisions. The trial judge stated that the evidence was insufficient, but did so under California Penal Code section 1385, which allows dismissal "in furtherance of justice." The dismissal also followed two rulings that there was *sufficient* evidence under California Penal Code section 1118.1. State court judges use these statutes on a daily basis and are in the best position to interpret them and rulings made pursuant to them. As noted in *Wright v. West, supra,* "State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims." 120 L.Ed.2d at p. 237, 112 S.Ct. at p. 2489. The same rationale should apply to the orders pursuant to the state procedural statutes involved here.

As discussed above, the trial judge's intent is relevant in interpreting the trial court's ruling. Of course, the trial judge was in the best position to know what his intent was: that respondent could be retried. The municipal court evaluated the effect of the dismissal order in light of the Double Jeopardy Clause and concluded that the order did not constitute an implied acquittal precluding retrial.

Respondent also raised the double jeopardy issue in petitions for writs of mandate in the superior court, California Court of Appeal and California Supreme Court. All of these petitions were denied. These denials, which were without opinion or citation to authority, are presumed to be based on the merits. *Turner v. Compoy* (9th Cir. 1987) 827 F.2d 526, 529, cert. denied, 489 U.S. 1059, reh. denied, 490 U.S. 1031.

The federal courts below should have given deference to the conclusion of the state courts. Had the federal courts done so, the writ would have been denied and the sovereignty of the state would have been upheld.

In *Lewis v. Jeffers* (1990) 497 U.S. ____, 111 L.Ed.2d 606, 622-624, 110 S.Ct. 3092, 3102-3104, the court adopted a "rational factfinder" standard to review on habeas corpus a state court's determination of aggravating circumstances. This standard is also appropriate in the present case because the interpretation of the dismissal order is largely a determination of what a dismissal means under California Penal Code section 1385, and the effect of denial of acquittal motions under California Penal Code section 1118.1. These applications and interpretations of state law are best resolved by the state court, and federal courts should give deference to the state court's conclusion.

The Court of Appeals cites *Greene v. Massey* (1978) 437 U.S. 19. (Slip. op., p. 6885.) In that case, a per curiam opinion by the Florida Supreme Court had found "that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial." *Id.* at p. 21. Three justices of the Florida Supreme Court filed a concurring opinion which found trial error. The Florida District Court of Appeal had interpreted the Florida Supreme court opinion as a finding of technical *sufficiency* of the evidence and the grant of a new trial in the interest of justice. *Id.* at p. 22 and fn. 2. The United States Supreme Court expressed no opinion as to the validity of this interpretation (*Id.* at p. 26, fn. 10), but remanded the case to clarify the ambiguities in the state court orders. *Id.* at pp. 26-27.

Subsequent to the Supreme Court's opinion, the Court of Appeals certified the case to the Florida Supreme Court, and then reexamined the issue in *Greene v. Massey* (5th Cir. 1983) 706 F.2d 548, cert. denied, 464 U.S. 1046, reh. denied, 465 U.S. 1074. The Court of Appeals considered itself bound by the interpretation given to the original per curiam opinion by later decisions of the Florida courts, and concluded:

> The reversal of Greene's first conviction was therefore not based on insufficiency of the evidence, but instead the reversal was based on the weight of the evidence and the "interests of justice."

Id. at p. 553.

The court thus denied habeas corpus relief. The court held that the Supreme Court opinion in *Tibbs v. Florida, supra*, did not mandate a contrary result.

As in *Greene v. Massey*, the state court in the present case concluded that there was no finding of insufficiency of the evidence that would bar retrial. Because this conclusion is a reasonable interpretation of the record, the court in the present case, as in *Greene v. Massey*, should rely upon the conclusion of the state court.

CONCLUSION

The Double Jeopardy Clause should not be interpreted to prevent retrial after a hung jury. The dismissal of charges "in furtherance of justice" does not constitute an implied acquittal which bars retrial when the trial judge expresses an intent that the defendant may be recharged and retried. In interpreting the state court's dismissal order in light of the Double Jeopardy Clause, federal courts should give deference to the interpretations and conclusions of the state court.

We respectfully request that a writ of certiorari issue in this case to resolve these important issues.

Respectfully submitted,

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APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DIANE HELEN MANNES,
Petitioner-Appellee,

v.

JOHN V. GILLESPIE, Sheriff,
Respondent-Appellant.

No. 91-55336
D.C. No.
CV-90-3297-AWT
OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted
December 3, 1991—Pasadena, California

Filed June 22, 1992

Before: James R. Browning, Robert Boochever and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Browning

SUMMARY

Criminal Law and Procedure/Double Jeopardy

Affirming a district court grant of habeas relief "forever prohibiting" the retrial of petitioner on murder charges, the court of appeals held that the district court's dismissal of the murder charges after a mistrial and a finding that the evidence at trial was insufficient to convict petitioner of murder was an acquittal for the purposes of the Double Jeopardy Clause barring reprosecution on those charges.

Appellee Diane Helen Mannes killed three pedestrians while driving under the influence of alcohol in violation of California law. After trial in Superior Court, the jury convicted Mannes of driving under the influence and deadlocked on the murder charges, which included vehicular manslaughter as a lesser-included offense. The trial court accepted the guilty verdicts, but declared a mistrial on the murder charges and discharged the jury. Subsequently, the trial court, on his own motion, dismissed the murder charges under Cal. Pen. Code § 1385, granting trial judges broad authority to dismiss cases in "furtherance of justice." The prosecutor then re-filed the murder charges in Municipal Court. Although Mannes objected to retrial as a violation of the Double Jeopardy Clause, the Municipal Court judge ordered Mannes to stand trial. Mannes unsuccessfully exhausted her state court remedies. The district court then granted Mannes petition for habeas relief, enjoining California from prosecuting Mannes for the murders. The state appealed.

[1] A claim that a state prosecution will violate the Double Jeopardy Clause presents an exception to the general rule of *Younger v. Harris* requiring federal courts to abstain from interfering with pending state criminal proceedings. However, because full vindication of the fifth amendment's protection against double jeopardy necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy. **[2]** The court noted that an accused has a strong interest in not being faced with murder charges even if a manslaughter trial is possible because the inclusion of a greater charge barred by double jeopardy can prejudice the ability of the accused to defend against a lesser charge.

[3] Because a § 1385 dismissal may, but need not be based on insufficiency of the evidence, the reason for the dismissal governs its effect for double jeopardy purposes. **[4]** Here, the language of the dismissal order supported Mannes' interpretation that it was based on a determination that the evidence

presented at trial was legally insufficient to support a verdict of guilty of murder. [5] The order did not say the trial court resolved any questions of credibility, a feature common to decisions based on weight rather than sufficiency. Nor did the order support the state's suggestion that the trial court was acting as the "13th juror."

[6] Although California law allows a felony charge dismissed once under § 1385 to be re-filed, apparently even if dismissal was based on insufficiency of the evidence, [7] the trial court's ruling that the evidence presented at trial was insufficient to convict Mannes of murder was the equivalent of an acquittal for purposes of the Double Jeopardy Clause. A judgment of acquittal entered after a deadlocked jury is dismissed terminates jeopardy and prevents retrial.

COUNSEL

Michael D. Schwartz, Deputy District Attorney, Ventura, California, for the respondent-appellant.

Neil B. Quinn, Deputy Public Defender, Ventura, California, for the petitioner-appellee.

OPINION

BROWNING, Circuit Judge:

The district court issued a writ of habeas corpus "forever prohibiting" the retrial of petitioner Diane Helen Mannes on three murder charges. The state argues the district court should have abstained, and, alternatively, that the court erred in ruling retrial of Mannes for the three murders was barred by the Double Jeopardy Clause. We affirm.

I

While driving under the influence of alcohol, Mannes struck five pedestrians, killing three and injuring two others. She was charged with three counts of murder (Cal. Pen. Code § 187(a)), one count of driving under the influence and causing injury (Cal. Veh. Code § 23153(a)), and one count of driving with a blood alcohol level of .10 percent or more and causing injury (Cal. Veh. Code § 23153(b)).

The charges were tried in Superior Court. The jury found Mannes guilty of both charges of driving under the influence and deadlocked on the three murder charges. The trial judge accepted the guilty verdicts, declared a mistrial on the murder charges, and discharged the jury.[1] Mannes was sentenced to four years in prison on the driving under the influence counts.

Two weeks after discharging the jury, the judge, acting on his own motion, dismissed the murder charges pursuant to Cal. Pen. Code § 1385, granting trial judges broad authority to dismiss cases "in furtherance of justice."[2]

The district attorney re-filed the murder charges in Municipal Court. Mannes objected on the ground retrial for murder

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[1]Pursuant to California law, the jurors were instructed on vehicular manslaughter, a lesser-included offense on the murder charges, but were told not to return a verdict on manslaughter unless they first unanimously agreed to acquit on the murder charges. *See People v. Hunter*, 782 P.2d 608, 617-18 (Cal. 1989) (approving such jury instructions). Since the jury deadlocked on the three murder charges and was then dismissed, no verdict was returned for manslaughter.

[2]Section 1385 provides:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. . . . .

Cal. Pen. Code § 1385(a).

would violate the Double Jeopardy Clause. The Municipal Court judge bound Mannes over for trial. Mannes' petition to the Superior Court for a writ of prohibition, her petition to the Court of Appeal for a writ of mandate, and her petition for review to the California Supreme Court were all denied without comment.

Mannes then sought a writ of habeas corpus from the court below. The district court granted the writ, enjoining California from prosecuting Mannes for the murders. The state appealed.

II

[1] Since Mannes exhausted state remedies on her double jeopardy claim, the district court had jurisdiction to hear her petition under 28 U.S.C. § 2254. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-03 (1984). A claim that a state prosecution will violate the Double Jeopardy Clause presents an exception to the general rule of *Younger v. Harris*, 401 U.S. 37 (1971), requiring federal courts to abstain from interfering with pending state criminal proceedings. The Fifth Amendment's protection against double jeopardy — "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb" — "is not against being twice punished, but against being twice put in jeopardy," *United States v. Ball*, 163 U.S. 662, 669 (1896); *Abney v. United States*, 431 U.S. 651, 661 (1977). Because full vindication of the right necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy. *Hartley v. Neely*, 701 F.2d 780, 781 (9th Cir. 1983) ("[P]retrial habeas corpus review is appropriate in those cases where, as here, all other state remedies were exhausted."); *Greyson v. Kellam*, 937 F.2d 1409, 1412-13 (9th Cir. 1991).

The state contends, however, that the district court should have abstained because, as in *Doe v. Donovan*, 747 F.2d 42 (1st Cir. 1984), even if Mannes' petition were granted she

could be retried for manslaughter, though not for murder,[3] and would remain in custody serving her sentence on the convictions for driving under the influence.

In *Doe*, the petitioner sought a writ of habeas corpus to prevent a Massachusetts juvenile court from trying her for murder, claiming trial on that charge would violate the Double Jeopardy Clause. *Id.* at 43. The court acknowledged the general rule that "a colorable double jeopardy claim may constitute the threat of injury necessary to fall within the exception to the *Younger* abstention principle," *id.* at 44, but held the exception inapplicable. The court explained that the petitioner would in any event be "subjected to the ordeal of a trial" for manslaughter, and "[b]ecause of the unique jurisdictional posture of this case," she would not suffer significantly greater injury if required to stand trial for murder rather than manslaughter, even if trial for the murder charges were subsequently found to have been barred by the Double Jeopardy Clause. *Id.* at 44-45. Trial for murder involved no greater risk to petitioner than trial for manslaughter. Petitioner was to be tried in juvenile court, would reach age 18 in less than a year, she could not be held in custody beyond that date whether she was convicted of murder or manslaughter. *Id.* at 45. This was the "[m]ost important" reason the court regarded abstention as appropriate. *Id.*

[2] No similar circumstance is present here. Moreover, an accused has a strong interest, which the court in *Doe* did not consider, in not being faced with murder charges even if a manslaughter trial is possible. The inclusion of a greater charge barred by double jeopardy can prejudice the ability of the accused to defend against a lesser charge. The prejudice may be so great as to require that a conviction on the lesser charge be overturned. *Price v. Georgia*, 398 U.S. 323, 331-32

[3]Mannes has not disputed the state's contention she can be retried for manslaughter even if the section 1385 dismissal bars retrial on the murder charges. We express no opinion on this issue.

(1970); *Morris v. Mathews*, 475 U.S. 237, 245-46 (1986). Because the accused already has been subjected to the ordeal of trial, overturning such a conviction is not a complete remedy for the double jeopardy violation. Further, the Supreme Court has recognized that, contrary to the apparent assumption of the court in *Doe*,

> [t]here is a significant difference to an accused whether he is being tried for murder or manslaughter. He has reason for concern as to the consequences in terms of stigma as well as penalty. He must be prepared to meet not only the evidence of the prosecution and the verdict of the jury but the verdict of the community as well.

Price v. Georgia, 398 U.S. at 331 n.10.

Doe involved unique facts and its reasoning has not been followed by any subsequent case. Because Mannes faced the possibility of irreparable injury if forced to stand trial on murder charges that might be barred by the Double Jeopardy Clause, the district court properly heard her petition.

III

We decide de novo whether retrial of Mannes for the murders is barred by the Double Jeopardy Clause. *Gray v. Lewis*, 881 F.2d 821, 822 (9th Cir. 1989).

Jeopardy attached when the jury was sworn. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Jeopardy did not terminate when the trial judge declared a mistrial after the jury deadlock. Accordingly, California was free to retry Mannes. *Richardson v. United States*, 468 U.S. 317, 326 (1984). Mannes argues, however, that the trial judge's *sua sponte* dismissal of the murder charges pursuant to Cal. Pen.

Code § 1385 two weeks after the mistrial was equivalent to an acquittal, terminating jeopardy and preventing retrial.[4]

Section 1385 provides that a trial judge may, either on the judge's own motion or that of the prosecutor, order an action dismissed "in furtherance of justice." An action may be dismissed under section 1385 before, during, or after trial. *People v. Orin*, 533 P.2d 193, 199 (Cal. 1975). A trial judge has broad but not unlimited discretion to dismiss under section 1385, *id.*; the court must consider "the constitutional rights of the defendant, and the interests of society represented by the People, in determining whether there should be a dismissal. At the very least, the reason for dismissal must be that which would motivate a reasonable judge." *Id.* (citations and emphasis omitted).

The impact of a section 1385 dismissal upon the application of the Double Jeopardy Clause depends on the reason for the dismissal. The relevant principles are discussed in *Hudson v. Louisiana*, 450 U.S. 40 (1981). After conviction by a jury, Hudson moved for a new trial, which the trial judge granted. *Id.* at 41. Louisiana law allowed the trial judge to order a new trial if "[t]he verdict is contrary to the law and the evidence," *Id.* at 41 n.1. The Supreme Court concluded that the trial judge "granted the new trial because the State had failed to prove its case as a matter of law, not merely because he, as a '13th juror' would have decided it differently." *Id.* at 44. What mattered for the purposes of the Double Jeopardy

[4]The state argues that "[b]ecause the jury hung, jeopardy did not attach and the parties were placed in the status quo as if no trial had occurred" and therefore that "the dismissal here must be considered a pretrial pre-jeopardy ruling which does not constitute an acquittal." Appellant's Opening Brief at 20. We disagree. While a jury deadlock does not terminate jeopardy, neither does it mean jeopardy has never attached. If Mannes is correct that the section 1385 dismissal was an acquittal, retrial would place her in jeopardy a second time. *See Martin Linen*, 430 U.S. at 575-76 (a judgment of acquittal, entered after hung jury, "concludes a pending prosecution in which jeopardy has attached" and precludes retrial).

Clause was the ground for the trial judge's order; because the judge determined that the state had failed to prove its case, retrial was barred.

An analogous situation is presented when an appellate court reverses a conviction. If the conviction is reversed for trial error there is no bar to retrial, but if reversal is based on insufficiency of the evidence presented at trial, retrial is precluded by the Double Jeopardy Clause. *Burks v. United States*, 437 U.S. 1, 15-18 (1978); *Greene v. Massey*, 437 U.S. 19, 24-26 (1978). Again, what matters is the reason for the decision.

[3] Because a section 1385 dismissal may, but need not be based on insufficiency of the evidence, the reason for the dismissal governs its effect for double jeopardy purposes. In ordering the dismissal under section 1385 in this case, the Superior Court judge stated he did so "for the following reasons":

> 1. There is insufficient evidence in this case that the defendant acted with "implied malice" as required for a verdict of guilty of murder.
>
> 2. There was insufficient evidence that the defendant was aware at the time of her drunk driving in this case, that she was committing an act that carried a high probability of death to herself or anyone;
>
> 3. There was insufficient evidence that being so aware, she consciously decided to do the act anyway, and
>
> 4. There is no likelihood that a retrial on these charges will result in a unanimous verdict of guilty of murder.

The state argues that the judge's statement of the reasons for dismissal was "gratuitous," and, like dicta, should not be

legally binding. The state adopts this argument from the oral ruling of the Municipal Court interpreting the Superior Court's statement of reasons:

> And the comments that [the Superior Court judge] made on pages 4 and 5 of his order I think were gratuitous, to the extent that he was suggesting that, in his view, it's unlikely that a jury would return a unanimous verdict on the murder. I don't think he was making a finding as a matter of law that there was insufficient evidence. So the motion to dismiss is denied.

Under California law, "[t]he reasons for the dismissal *must* be set forth in an order entered upon the minutes." Cal. Pen. Code § 1385(a) (emphasis added). This requirement "is mandatory and not merely directory" and the failure to set forth reasons "is fatal and is alone sufficient to invalidate the dismissal ...." *People v. Orin*, 533 P.2d at 198-99; *see also People v. Howard*, 446 P.2d 138, 146 n.7 (Cal. 1968) ("If the reasons are not set forth in the minutes, the order dismissing may not be considered a dismissal under Section 1385."). Thus, the Superior Court's statement of reasons was not "gratuitous;" it is the strongest evidence of the grounds for the dismissal.

Mannes argues the dismissal was based on a determination the evidence presented at trial was legally insufficient to support a verdict of guilty of murder. The state argues dismissal was based on the "weight," rather than the "sufficiency" of the evidence or was based on the views of the trial judge acting as a "13th juror." Reversal of a conviction as against the weight, rather than the sufficiency, of the evidence does not prevent retrial, *Tibbs v. Florida*, 457 U.S. 31, 42-45 (1982); *Hudson*, 450 U.S. at 43-45 & n.5, and the state argues the same distinction should apply to the dismissal of charges after a mistrial.

[4] The language of the dismissal order supports Mannes' interpretation. The order does not refer at all to the "weight" of the evidence but refers several times to "insufficient evidence." As the Supreme Court has noted, "trial and appellate judges commonly distinguish between the weight and the sufficiency of the evidence." *Tibbs,* 457 U.S. at 44. Further, there was no occasion to set aside a verdict as "against the weight" of the evidence, since no verdict was reached. "A reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction *and has persuaded the jury to convict.*" *Id.* at 42-43 (emphasis added).

[5] The order does not say the trial judge resolved any questions of credibility, a feature common to decisions based on weight rather than sufficiency. *See id.* at 37-38 & n.11. Nor does the order support the state's suggestion the trial judge was acting as a "13th juror" — the order does not refer to the opinion of the judge as to guilt, but instead states "[t]here is insufficient evidence in this case that the defendant acted with 'implied malice' *as required for a verdict* of guilty of murder," and concludes "[t]here is no likelihood that a retrial on these counts will result in a *unanimous verdict* of guilty of murder." (emphasis added).

In this context, the phrase "insufficient evidence" is a term of art. In the absence of a clear indication to the contrary, we must assume the trial judge intended the phrase to carry its accepted meaning that the evidence presented at the trial was not legally sufficient to support a conviction for the crime charged, rather than that the judge "entertained personal doubts about the verdict." *Hudson,* 450 U.S. at 44. *See Delap v. Dugger,* 890 F.2d 285, 310 (11th Cir. 1989) (" '[I]nsufficient' evidence is a legal term of art, indicating that there was no evidence which would enable a reasonable jury to find the defendant guilty.").[5]

[5]The state notes that the trial judge denied Mannes' motions for acquittal after the prosecution rested its case and at the close of the evidence. We

[6] California law allows a felony charge dismissed once pursuant to section 1385 to be re-filed, apparently even if dismissal was based on insufficiency of the evidence. *See People v. James*, 162 Cal. Rptr. 263 (Cal. Ct. App. 1980). The trial judge in this case believed retrial would be possible. Nevertheless, whether the Double Jeopardy Clause bars a prosecution is not determined by the characterization of a dismissal under state law, nor by the trial judge's personal understanding in this regard. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.5 (1986); *United States v. Scott*, 437 U.S. 82, 96 (1978). What matters is whether the ruling in Mannes' favor was actually an "acquittal" even if state law or the trial court may have labeled it otherwise. *See Martin Linen*, 430 U.S. at 571 n.9; *see also Hudson*, 450 U.S. at 41-45 (finding of insufficient evidence, though made in the course of granting a motion for new trial, is an acquittal for double jeopardy purposes).

[7] The trial judge's ruling that the evidence presented at trial was insufficient to convict petitioner of murder was an acquittal for the purposes of the Double Jeopardy Clause. *Richardson*, 468 U.S. at 325 n.5 ("[A] trial court's finding of insufficient evidence . . . is the equivalent of an acquittal."); *Hudson*, 450 U.S. at 44-45 & n.5. A judgment of acquittal entered after a deadlocked jury is dismissed terminates jeop-

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agree with the state that, if the evidence presented at trial was insufficient, the trial court should have granted the motions for acquittal pursuant to Cal. Pen. Code § 1118.1. Nevertheless, the state points to no bar to reconsideration by the trial court of the sufficiency of the evidence. The state's argument that a California trial judge has no authority to "acquit" a defendant pursuant to section 1385 is misplaced. What matters is whether, regardless of what label is attached to the dismissal, the reason for dismissal was insufficiency of the evidence presented at trial. Insufficiency of the evidence is plainly a reason that "would motivate a reasonable judge," and dismissal under section 1385 for this reason has precedent under California law. *See, e.g., People v. Howard*, 446 P.2d at 141, 147-48 (approving of section 1385 dismissal due to "[i]nsufficiency of the evidence to prove the defendant's guilt beyond a reasonable doubt").

ardy and prevents retrial. *Martin Linen*, 430 U.S. at 572, 575-76. The district court correctly ruled that retrial of Mannes for murder is barred by the Double Jeopardy Clause.[6]

AFFIRMED.

[6]Citing *Grady v. Corbin*, 495 U.S. 508 (1990), Mannes argues for the first time on appeal that the Double Jeopardy Clause bars her retrial for murder (and presumably for manslaughter) because she was convicted of the two driving under the influence counts. She contends a new prosecution is prohibited because the government, "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521. Because Mannes did not raise this issue in her habeas petition, it is not properly before us. *Willard v. People of State of California*, 812 F.2d 461, 465 (9th Cir. 1987); *Ahlswede v. Wolff*, 720 F.2d 1108, 1109 (9th Cir. 1983). Moreover, Mannes has not presented this claim to the state courts. Exhaustion of state remedies is a prerequisite to federal habeas review. *Justices of Boston Mun. Court*, 466 U.S. at 303.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

PEOPLE OF THE
STATE OF CALIFORNIA,
Plaintiff,

CASE NO. CR-24885

v.

DIANE HELEN MANNES,
Defendant.

Honorable Robert J. Soares, Judge

PARTIAL TRANSCRIPT OF NOVEMBER 7, 1989

The Court: All right. The motion is denied. It is my understanding under the requirement of Section 1118.1, which I assume your motion was made under, rather than 1118.

Mr. Dahlstedt [defense counsel]: That is correct.

The Court: That the Court is to grant this motion only when there is no evidence to sustain a jury's decision.

And with respect to your analysis of the reasonable doubt, if the Court were in a criminal matter to hold a reasonable doubt concerning the defendant's guilt, that does not mean that an 1118 - because it's a decision in a jury trial that the jury makes not the Judge - the Judge is not the finder of fact, nor to give credibility to the witnesses.

The motion has been denied.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)	CASE NO. CR-24885
v.	)	
DIANE HELEN MANNES, Defendant.	)	

Honorable Robert J. Soares, Judge

PARTIAL TRANSCRIPT OF NOVEMBER 9, 1989

The Court: All right. These proceedings are outside the presence of our jury.

Are there any matters that need to be discussed by counsel at this time?

Mr. Dahlstedt: Yes, your Honor.

I would like to make an 1118.1 motion again. I believe I am entitled to after the close of the case by either side.

I think that the district attorney has not presented, again, any evidence on the element of high probability. The only evidence that we have is that it is not very probable.

And now the district attorney can challenge that evidence, but you have to remember he has the burden. And even in an 1118.1 it recognizes the burden is on the prosecution to present, not only some evidence, but to carry the burden proving the case.

And at this point we have no evidence at all. He can argue with the evidence that I presented, but he has no evidence on his own.

Now I would just submit to the Court that the element of high probability of death has not been shown and that I think the 1118.1 should be granted on that basis.

The Court: The motion is denied.

The law with respect to the 1118.1 at the close of all the evidence requires that the Court, in addition to the People's evidence, weigh the evidence by the Defense. And any evidence that is produced by the Defense is to be considered in making the decision as to whether an 1118.1 should be granted.

And for the reasons I stated at the time of the original motion I am still of the opinion there is enough evidence before this jury for the 1118.1 to be denied and it is.

All right. We are in recess till Wednesday morning.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

FILED: December 1, 1989

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff	)	NO. CR24885
vs,	)	ORDER ON REQUEST TO RESET MURDER CHARGES FOR TRIAL
DIANE MANNES Defendant	)	

This order is in response to the People's motion to reset the murder counts upon which the jury was unable to reach a verdict and the defendant's objections thereto.

After the jury was discharged the district attorney requested that the court continue the case so that motions regarding retrial and sentencing could be presented to the court. The court did this. At the hearing, the district attorney simply stated that the court should reset the murder charges for trial, because the district attorney's office was going to retry the defendant for murder no matter what the trial court did, so I should just save everyone's time and money and reset the trial. I believe judicial decisions of this magnitude should not be made solely upon such grounds.

The court in ruling upon the motion of the district attorney to reset counts 1, 2 and 3 for trial must consider many things. In this order I will try to set out the factors which bear on this decision. I have done so in writing so that, right or wrong, I will not be misunderstood or misquoted.

Under the laws of our state, the district attorney is given the legal duty to examine the case as presented to the first jury and any additional evidence which can be presented at a second trial and decide whether:

(1) He is convinced beyond a reasonable doubt that the defendant is guilty of the murder charge; and

(2) Whether the case can be presented to a new jury in such a way that all 12 jurors will also be convinced beyond a reasonable doubt that the defendant is guilty of murder; and

(3) The interests of justice require a conviction at the level of murder for the acts committed.

If all three of the above criteria have been satisfied, then the motion to reset should be made to the trial judge.

While, as a judge, I have no way of reviewing the thought process of the district attorney with respect to criteria (1) above, it is my duty to review criteria (2) and (3) to determine whether the case should be reset for trial.

In deciding whether a second trial could be successful, we need to analyze the first trial to see what might be done differently so that a different result could be expected.

The time between arrest and trial was nearly seven months. Clearly this was ample time to investigate, obtain witnesses, gather evidence, and prepare for trial.

The case was assigned to one of the most senior, experienced, and capable trial attorneys in the district attorney's office.

The jury was selected with great care. Twelve trial jurors and two alternates were selected, accepted and approved by the court, district attorney and the defendant. A review of each selected juror reveals a true cross-section of our society, each dedicated to following the law

and determining the facts from the evidence presented. All prospective jurors who even appeared to have pro-prosecution or pro-defense leanings were excused. Jury selection actually took approximately 40 per cent of the total jury trial time and was done with great deliberation.

All witnesses sought to be produced by the prosecution were available at trial and provided their testimony to the jury.

The jury was instructed in the applicable law. The district attorney sought no instructions which were not given nor did he object to any of those given.

The jury gave all indications of having deliberated carefully and taking their grave responsibilities in the manner which this case deserved.

Inasmuch as the district attorney had elected to charge these deaths only as murder, the jury, unless they unanimously agreed that the defendant was not guilty of murder did not even have the choice to find her guilty of manslaughter. Their final vote was seven to five in favor of conviction—close to an even split jury.

I can see no reasonable possibility that a new jury could arrive at a unanimous verdict of guilty on the murder charge in this case. The district attorney has not even offered to amend the charge so that the jury would have the choice to find the defendant guilty of manslaughter without having to unanimously agree that she is not guilty of murder. Without such an option, it is my finding that one, or ten, retrials would not result in a unanimous verdict of guilty as to murder.

I have no illusions that my decision to dismiss these charges will be met with approval of the families and friends of the victims, or by much of the public at large. For who likes drunk drivers—and even less—much less—who likes drunk drivers who kill!! Which of us who have lost one of our children does not wish to the maximum penalty for their killer.

I am aware that our laws provide that this dismissal does not prevent the refiling of these murder charges—and a new trial. But that fact does not take away my obligations as the trial judge to rule on this matter in a manner which is not based upon public feelings, or public opinion.

The jury did convict the defendant of felony drunk driving and causing injury to two people. She shall be punished for that. She also should not escape punishment for any deaths she has caused. Provided she is properly charged, I am certain she will not.

Counts 1, 2 and 3 are dismissed pursuant to section 1385 of the Penal Code for the following reasons

1. There is insufficient evidence in this case that the defendant acted with "implied malice" as required for a verdict of guilty of murder.

2. There was insufficient evidence that the defendant was aware at the time of her drunk driving in this case, that she was committing an act that carried a high probability of death to herself or anyone;

3. There was insufficient evidence that being so aware, she consciously decided to do the act anyway, and

4. There is no likelihood that a retrial on these charges will result in a unanimous verdict of guilty of murder.

Dated: November 30, 1989

/s/ R. J. Soares
ROBERT J. SOARES
Judge of the Superior Court

APPENDIX E

VENTURA COUNTY MUNICIPAL COURT
STATE OF CALIFORNIA

COURTROOM 12 HON. BRUCE A. CLARK, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	)	
	)	NO. FE-74948
vs.	)	
DIANE HELEN MANNES, Defendant.	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

Wednesday, January 10, 1990

THE COURT: In reading the order prepared by Judge Soares, it appeared to me that it was more to his comments criticizing the district attorney for his pleadings, suggesting that the pleadings should have included counts of manslaughter to give the jury the opportunity to consider that.

And the comments that Judge Soares made on pages 4 and 5 of his order I think were gratuitous, to the extent that he was suggesting that, in his view, it's unlikely that a jury would return a unanimous verdict on the murder. I don't think he was making a finding as a matter of law that there was insufficient evidence. So the motion to dismiss is denied.

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

JUDGE: LAWRENCE STORCH

CASE NO.: 109934 DATE: 3-16-90 TIME: 1:30

CLERK: CHRIS LEAVITT
BAILIFF: V. MARKLEY
CRT. RPTR: M. HECKERMAN
DDA: MICHAEL SCHWARTZ
DEFENSE CNSL: ROBERT DAHLSTEDT

TITLE OF CASE:

DIANE HELEN MANNES
Plaintiff

vs.

VENTURA MUNICIPAL COURT
Defendant

NATURE OF PROCEEDINGS:
PETITIONER'S OSC RE: WRIT OF PROHIBITION-DENIED

(/) Petition for: (/) Writ of Prohibition (/) Denied

THE COURT ORDERS ALL PROCEEDINGS IN MUNICIPAL COURT STAYED TO APRIL 16, 1990.

SHEILA GONZALEZ, Superior Court
Executive Officer and Clerk

/s/ Chris Leavitt
Deputy Clerk

CRIMINAL WRIT/MOTION/REQUEST MINUTE ORDER

APPENDIX G

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

DATE: 03/29/90

RE: Mannes, Diane Helen
vs.
Ventura County Superior Court
The People of the State
2 Criminal B049021
Ventura No. CR24885

THE COURT:
PETITION FOR WRIT OF MANDATE DENIED

APPENDIX H

FILED: MAY 23, 1990

ORDER DENYING REVIEW
AFTER JUDGMENT OF THE COURT OF APPEAL

Second Appellate District, Division Six, No. B049021
S014921
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

DIANE HELEN MANNES, Petitioner

v.

VENTURA COUNTY SUPERIOR COURT, Respondent

THE PEOPLE, Real Party in Interest

Petition for review DENIED.

/s/ LUCAS
Chief Justice

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED DECEMBER 27, 1990

DIANE HELEN MANNES,)	
)	CASE NO. CV90-3297-AWT (B)
Petitioner,)	
v.)	REPORT AND
)	RECOMMENDATION OF
JOHN V. GILLESPIE,)	UNITED STATES MAGISTRATE
SHERIFF, et al.,)	JUDGE
)	
Respondents.)	

This Report and Recommendation is submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Petitioner, through counsel and paying the $5.00 filing fee, initiated this action on June 25, 1990 by filing her Petition for Writ of Habeas Corpus by a Person in State Custody. On July 27, 1990, Your Honor held a hearing on this Magistrate's recommendation that this court stay petitioner's retrial in Superior Court pending adjudication of her contention herein that such retrial is precluded by the Constitutional prohibition of double jeopardy, and by Stay Order of the same date, you stayed further proceedings in state court "until further order of this court."

A Return and a Traverse have been duly served and filed. The matter has been at issue without oral argument since September 4, 1990.

The pertinent facts are not disputed. Petitioner was charged in the Superior Court for the County of Ventura with three counts of murder "with malice aforethought" in driving with "gross negligence" while intoxicated, one count of driving under the influence of alcohol causing injury in violation of Vehicle Code Section 23153(a), and one count of driving with a blood alcohol level of .10%, causing injury, in violation of Vehicle Code Section 23153(b). She was convicted of both Vehicle Code violations, for which she was sentenced to imprisonment for four years. She is in custody serving this time, and in lieu of $250,000 bail for the still-pending murder charges. The jury hung (seven to five for conviction) as to the murder charges, whereupon a mistrial was declared on November 17, 1989. Record, page 60. Thereafter, "so that, right or wrong, I will not be misunderstood or misquoted," by Order On Request to Reset Murder Charges for Trial filed December 1, 1989, Trial Judge Robert J. Soares ordered that the three murder counts be "dismissed pursuant to section 1385 of the Penal Code for the following reasons:

"1. There is insufficient evidence in this case that the defendant acted with 'implied malice' as required for a verdict of guilty of murder.

"2. There was insufficient evidence that the defendant was aware at the time of her drunk driving in this case, that she was committing an act that carried a high probability of death to herself or anyone.

"3. There was insufficient evidence that being so aware, she consciously decided to do the act anyway, and

"4. There is no likelihood that a retrial on these charges will result in a unanimous verdict of guilty of murder." Record, pp. 71-72.

The District Attorney refiled the murder charges which had been so dismissed. Retrial was scheduled for July 30, 1990, and all available state remedies to avoid or postpone such retrial were exhausted. The District Attorney was unwilling to stipulate, and the Superior Court refused, to continue the trial pending the determination of this court in this action. Your Honor therefore issued the stay above mentioned.

The single question presented is whether on the undisputed facts of this case the Fifth Amendment to the United States Constitution prohibits the State from retrying petitioner on the murder counts.[1] Specifically, the Fifth Amendment provides

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb ...".

This has been interpreted to mean that a defendant cannot be retried if the evidence adduced at trial was legally insufficient to sustain a conviction. *Burks v. United States*, 437 U.S. 1, 15 *et seq.* (1978). It makes no difference whether it is the trial court or a reviewing court which determines the evidence is insufficient. *Burks* at 11. Where the trial court finds that the evidence at the first trial was legally insufficient to sustain a verdict, double jeopardy protection would be violated by a retrial on the same charges. *Hudson v. Louisiana*, 450 U.S. 40, 43 (1981). *That is this case!*

"(T)he prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Burks*, page 16.

But the prosecution does complain. First, it says "we deny that there was in fact insufficient evidence." Return, page 3. But the written determination of the trial judge is of the type made conclusive by 28 U.S.C. 2254(d), absent applicability of one of the eight numbered subsections. Significantly as to the subsections, the state record by which this court could have tested the accuracy of the trial judge's holding has not been presented by respondent. The finding is, therefore, binding here.

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[1]/Petitioner would not escape punishment for her conduct. As stated, she is now serving a four-year sentence for Vehicle Code violations. Her only defense to the murder charges was lack of malice. *She would plead guilty if charged with manslaughter*, rather than murder. Traverse, page 6.

The prosecution complains, second, that Judge Soares did not rule, as a matter of law, that the evidence was insufficient. Return, page 15. The Magistrate Judge has read, and with respondent's said theory in mind has reread, the said Order and respectfully disagrees. The trial judge was ruling as a matter of law, that is to say he was expressly applying the law (Penal Code Section 1385) to the facts. In so doing, he ruled that an essential element of the crime of murder, malice, had not been proved by sufficient evidence. Q.E.D.

The prosecution complains, third, that Judge Soares himself wrote in his subject order: "I am aware that our laws provide that this dismissal does not prevent the refiling of these murder charges — and a new trial." See Record, page 71. It is true that the trial judge wrote this.[2] It is equally true that even if California law otherwise permits a retrial, the Fifth Amendment prohibits it. And, the intention of the trial judge to allow a retrial is not determinative. *Hudson, supra*, 450 U.S. 40.

The prosecutor complains, fourth, that if the evidence really had been insufficient as a matter of law, petitioner's Penal Code Section 1118.1 motions would have been granted. Return, page 19. Said section directs that the trial court "shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient." But the trial judge misinterpreted Section 1118.1, mistakenly believing that "the Court is to grant this motion only when there is *no* evidence to sustain a jury's decision." Record, pp. 50-51, emphasis added. One cannot, therefore, say how the trial judge would have ruled under Section 1118.1 if he had correctly understood it at the time.

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[2]/ He also wrote at the same page, inconsistently, that plaintiff would not escape further punishment if she were "properly charged", apparently with manslaughter.

The prosecutor complains, last, that "a dismissal pursuant to Penal Code section 1385 does not resolve any factual elements of the crime, but reflects merely the court's conclusion that dismissal would be 'in the furtherance of justice.'" Return, page 21. This may be what state law provides, but if it is it is ineffective to deprive petitioner of her Fifth Amendment constitutional rights. Given the factual finding of insufficient evidence in the Order, its legal effect *under the Constitution* prevents a new prosecution.

Petitioner's counsel is commended for the high quality of his briefs.

THE MAGISTRATE JUDGE THEREFORE RECOMMENDS that an Order be issued by the Court (1) approving and adopting this Report and Recommendation, and (2) granting the petition for writ of habeas corpus forever prohibiting retrial of the petitioner on the three charges of murder which were dismissed by Judge Soares.

DATED: December 21, 1990.

VOLNEY V. BROWN, JR.
U.S. MAGISTRATE

VOLNEY V. BROWN, JR.
United States Magistrate Judge

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED: JANUARY 31, 1991

DIANE HELEN MANNES,	)	
	)	
Petitioner,	)	CASE NO. CV90-3297-AWT (B)
	)	
v.	)	FINAL REPORT AND
	)	RECOMMENDATION OF
JOHN V. GILLESPIE,	)	UNITED STATES
SHERIFF, et al.,	)	MAGISTRATE JUDGE
	)	
Respondents.	)	

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable A. Wallace Tashima, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

To the Report and Recommendation served and filed December 27, 1990, petitioner [sic] has filed his timely Objections. The Magistrate Judge has carefully read and considered these, but is unpersuaded to change his opinion. The trial judge *did* determine that the evidence was insufficient as a matter of law. Report and Recommendation, page 4. The trial judge *did* misinterpret P.C. 1118.1, applying the wrong standard. Report and Recommendation, page 5. The trial judge's erroneous comments as to refiling of the murder charges does *not* affect his finding that the evidence presented at the first trial was insufficient as a matter of law.

THE MAGISTRATE JUDGE THEREFORE FINALLY RECOMMENDS that an Order be issued by the Court (1) adopting and approving the Report and Recommendation, and (2) granting the petition for writ of habeas corpus forever prohibiting retrial of the petition [sic] on the three charges of murder which were dismissed by Judge Soares.

DATED: January 31, 1991.

/s/ Volney V. Brown, Jr.
VOLNEY V. BROWN, JR.
United States Magistrate Judge

APPENDIX K

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: FEBRUARY 7, 1991

DIANE HELEN MANNES,	
	NO. CV 90-3297 AWT (B)
Petitioner,	
	ORDER APPROVING
v.	MAGISTRATE JUDGE'S
	REPORT
JOHN V. GILLESPIE, SHERIFF, et al.,	
Respondents.	

Pursuant to 28 U.S.C. § 636(b)(1), the Court has reviewed all of the records and files herein, the Report and Recommendation of the United States Magistrate Judge (the initial Report), respondents' Objections to the initial Report and the Magistrate Judge's Final Report and Recommendation (the final Report). The Court has made a *de novo* determination of those portions of the initial Report to which objection has been made. The Court approves and adopts the initial Report. Accordingly,

IT IS ORDERED:

1. The Petition for Writ of Habeas Corpus is granted.

2. Judgment shall issue consistent herewith.

3. The Clerk shall serve this Order, the initial Report, the final Report and the Judgment herein on all counsel of record and the Clerk of the Superior Court for the County of Ventura.

Dated: FEB. 05, 1991

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: FEBRUARY 7, 1991

ENTERED: FEBRUARY 8, 1991

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

DIANE HELEN MANNES,	)
	)CASE NO. CV90-3297-AWT (B)
Petitioner,	)
	)JUDGMENT
v.	)
	)
JOHN V. GILLESPIE, SHERIFF,)	
et al.,	)
	)
Respondents.	)

Pursuant to the Order of the Court adopting and approving the Report of the United States Magistrate Judge,

IT IS ADJUDGED that petitioner is entitled to, and that this Judgment shall constitute a Writ of Habeas Corpus forever prohibiting the retrial of petitioner for the murder of Darrin Scott Mullins, Joshua Daniel Oxenreider and/or Jacob Eugene Boyd.

DATED: FEB. 05, 1991

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED: FEBRUARY 20, 1991

DIANE HELEN MANNES,	)	
	)	
Petitioner,	)	NO. CV 90-3297 AWT(B)
	)	
v.	)	ORDER ON MOTION TO
	)	AMEND JUDGMENT
JOHN V. GILLESPIE,	)	
etc., et al.,	)	
	)	
Respondents.	)	

After judgment granting the writ of habeas corpus, respondent has moved to amend the judgment, pursuant to F. R. Civ. P. 52(b) and 59(e). Upon review of the motion, the court has determined that neither opposition nor oral argument would be helpful. The motion is now submitted for decision without oral argument. F. R. Civ. P. 78; Local Rule 7.11.

Although captioned a motion to "amend" the judgment, in fact, the relief requested is to vacate the judgment, *i.e.*, that "the writ be denied." The motion is a motion for reconsideration. *See* Local Rule 7.16. Two grounds are set forth: (1) A request for oral argument; and (2) Error of law.

Under applicable rules, the court is not required to hear oral argument. *See* F. R. Civ. P. 78; Local Rule 7.11. Moreover, nothing in the governing statutes requires that oral argument be permitted. *See* 28 U.S.C. §§ 636(b)(1) & 2254; *see also* F. R. Civ. P. 72(b).

With respect to the substance of the motion, it is nothing more than a reargument of the same position (supported by the same case citations) originally presented by respondent. Thus, this motion contravenes the rule that, "No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." Local Rule 7.16.

IT IS ORDERED:

1. The notice hearing date of March 11, 1991, is vacated.

2. The motion to amend judgment and for rehearing is DENIED.

DATED: FEB. 20, 1991

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX N

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CALIFORNIA PENAL CODE, SECTION 1118.1

In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.

CALIFORNIA PENAL CODE, SECTION 1385

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) **Same: conditional ruling on grant of motion.** If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

No. 92-467

In The

Supreme Court of the United States

October Term, 1992

JOHN V. GILLESPIE, SHERIFF,

Petitioner,

v.

DIANE HELEN MANNES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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Statement of the Case

Respondent Mannes stood trial in state court for murder and other charges stemming from a vehicular collision. After the jury convicted her on the other charges but could not agree on the murder counts, the trial judge dismissed those counts, making a written finding of insufficiency of the evidence. The State did not appeal the dismissal, but filed a new complaint alleging the same murder charges.

Mannes, by motion, objected to the new prosecution on Double Jeopardy grounds. The Magistrate of the Municipal Court orally denied the motion, upon the basis that the finding regarding the insufficiency of evidence was a "gratuitous" comment, not an acquittal. Mannes sought discretionary pretrial review of this decision from the Superior Court, the Court of Appeal, and the state Supreme Court. Each petition was denied without comment.

Mannes then petitioned the federal district court for a writ of habeas corpus. The district court issued the writ, finding that the trial judge's ruling constituted an acquittal within the meaning of the Double Jeopardy Clause. The State appealed to the Ninth Circuit Court of Appeals, contending that the district court should have abstained because the state criminal proceeding was pending, and further that there was no acquittal within the meaning of the Double Jeopardy Clause. The Court of Appeals affirmed, and the instant petition followed.

Subsequent to the filing of the petition, the Petitioner sought and obtained a recall of the mandate of the Court of Appeals, effecting a stay of the state court proceedings

pending review in this court. Mannes has served the prison sentence suffered for the convictions obtained in the first trial, and remains out of custody on parole pending resumption of proceedings in the state court.

There is now pending in the California Court of Appeal, Second District, Division Six, a petition for a discretionary writ to require the Superior Court to dismiss the pending murder charges based upon denial of state statutory speedy trial rights. The petition was filed October 16, 1992, Number B070708, and has yet to be acted upon.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Summary of Argument

The Petition sets forth three questions. The first two, concerning the Double Jeopardy Clause, involve nothing more than the application of settled principles to the particular facts at hand, hence do not warrant review by this court.

The third question involves the broader issue of the appropriate standard of review that federal courts should utilize in habeas corpus proceedings. However, this case is not an appropriate vehicle to re-examine such a far-reaching issue for several reasons. First, this issue was not adequately presented below, and should be deemed waived as the Petitioner urged the Court of Appeals to review the matter de novo.

More importantly, this is not a case which involves a collateral attack on a conviction, or other final judgement, so the reasons, as recently discussed in *Wright v. West*, *infra*, for a "deferential" standard of review are absent. The proposed "deferential" standard is inappropriate where, as here, there is no written nor binding opinion from the state courts to guide or inform the federal court.

Furthermore, in habeas petitions based upon the circumstances presented in this case, the standard of review is settled. Federal courts cannot "defer" to state court characterizations of whether a particular ruling constitutes an acquittal without abdicating enforcement of the Double Jeopardy Clause.

Additional practical and equitable reasons suggest that certiorari should be denied. Because alternate grounds supporting the judgement below exist, it is unlikely that this Court would reach the question concerning the review. The equities of the case do not favor the State, since it seeks by this petition to avoid not only the ruling of the federal district court, but also the judgement of the state trial judge, who determined that a retrial on murder charges would not be in the interests of justice. There is also a possibility that the case could become moot based upon a currently pending application in the state appellate court for a dismissal based on a violation of state statutory speedy trial rights.

ARGUMENT TO DENY CERTIORARI

I. NO REASON TO GRANT REVIEW HAS BEEN SUGGESTED IN RELATION TO THE FIRST TWO QUESTIONS PRESENTED, WHICH CONCERN THE APPLICATION OF THE DOUBLE JEOPARDY CLAUSE, AND NO SUCH REASONS EXIST

Other than to argue that the result below was wrong, the brief of Petitioner does not even attempt to assert any reasons why certiorari should be granted with respect to the first two questions, which concern the application of the Double Jeopardy Clause. This omission is understandable because the opinion below does not conflict with decisions of other circuits or of this Court, and does not announce any new or previously unsettled principle of law.

The controlling question presented in this case is whether the written finding of the state court trial judge of "insufficient evidence" of malice, made in support of his decision to dismiss those charges after a hung jury, constituted an acquittal under the Double Jeopardy Clause. The principles applicable in this context have been firmly established in *Hudson v. Louisiana*, 450 U.S. 40 (1981). The Petitioner appears to concede that the rule is clearly established and does not urge this court to reconsider its previous holdings:

> "Case law explains that a dismissal will be considered to be an implied acquittal barring retrial only if the court concludes that the evidence was insufficient *as a matter of law.*" (Petition, page 7, italics in original.)

Because the controlling principle of law is concededly established, this case involves nothing more than the application of that rule to the particular facts at hand, hence does not warrant review by this court. *United States v. Johnson*, 268 U.S. 220, 227 (1925). The district court magistrate, the district court judge, and three judges of the Court of Appeals have all reasonably found that the rule of *Hudson, supra*, was invoked by the trial court's written finding of "insufficient evidence", and this court should not disturb their findings.

II. THE THIRD QUESTION, RELATING TO THE STANDARD OF REVIEW, HAS BEEN WAIVED BY FAILURE TO ADEQUATELY PRESENT AND PRESERVE THE ISSUE BELOW

Petitioner urges that this case presents the broad question whether federal courts on habeas corpus should defer to state court rulings interpreting state court orders. The rule that Petitioner proposes is apparently that the federal court is bound by the state court's characterization of a ruling if the state court's "conclusion is a reasonable interpretation of the record." (Petition, page 20) Petitioner wishes to apply the rule to the Municipal Court Magistrate's oral ruling where the Magistrate characterized the trial judge's written findings as "gratuitous" and not a "finding as a matter of law that there was insufficient evidence." (Petition, Appendix E) This proposition is advanced for the first time here.

In the Return to the Petition for Habeas Corpus, the Petitioner filed lengthy points and authorities arguing against the issuance of the writ. No assertion was made

that the District Court was bound by the Municipal Court Magistrate's characterization if it was a "reasonable" one. The only direct reference to the Municipal Court ruling came at the bottom of page 23, where it was argued:

> "In denying the motion to dismiss, the Municipal Court aptly characterized the trial judge's comments as 'gratuitous' (Record, p. 120, lns. 13-14). Just as dicta is not binding as precedent, gratuitous comments by the trial court should be of no legal effect."

The Petitioner also failed to urge this point in the objections filed to the federal magistrate's report recommending the issuance of the writ. (Petition, Appendix I) No mention is made of the Municipal Court Magistrate's ruling in those objections filed Jan. 16, 1991. The notice accompanying the federal magistrate's report included the warning "Failure to so object within the time limit specified shall be deemed a consent to the recommendation and a waiver of any appeal."

The motion to amend the judgement and for rehearing filed by Petitioner in the District Court on February 15, 1991, is also devoid of any reference to the purportedly binding effect of the ruling of the Municipal Court Magistrate.

In Petitioner's opening brief to the Court of Appeals, page 14, under the heading "The comments of the trial judge did not constitute an implied acquittal", it was urged that the Court of Appeals review the matter de novo: "Thus the issue should be decided de novo, and no presumption of correctness should be afforded the conclusion below [citations omitted]." Later, at page 20, Petitioner in a single paragraph cited *Lewis v. Jeffers*, 497 U.S.

___, (1990) 111 L.Ed.2d 606, 622-624, 110 S.Ct. 3092, for the proposition that "[t]he District Court was bound to accept state court interpretations of **state law**" (emphasis added), referencing the Municipal Court magistrate's ruling, but never suggested that the District Court or the Court of Appeals was required to defer to the state court ruling on the mixed constitutional question of whether the trial judge's ruling constituted an acquittal within the meaning of the Double Jeopardy Clause.

The reply brief below is also devoid of reference to the proposition that the federal court was required to defer to the Municipal Court Magistrate's ruling. The Court of Appeals reviewed the matter de novo, citing *Gray v. Lewis*, 881 F.2d. 821, 822 (9th Cir. 1989) (Opinion, page 6883). Petitioner never sought rehearing, even though *Wright v. West*, 505 U.S.___, 112 S.Ct. 2482 (June 19, 1992), now relied on by Petitioner, was decided prior to the issuance of the opinion below.

The State, just as the prisoner, must adequately raise and preserve issues below, if it is to seek redress from this court. The State successfully prevented the respondent from raising her claim under *Grady v. Corbin*, 495 U.S. 508 (1990) (Opinion, note 6), having urged that "Petitioner may not raise a new issue on Appeal" (Reply Brief on Appeal, page 10, heading). The same rule should apply to the State.

III. THIS CASE DOES NOT PRESENT THE TYPE OF CONCERNS WHICH JUSTIFY A REEXAMINATION OF THE SETTLED RULE THAT MIXED CONSTITUTIONAL QUESTIONS ARE SUBJECT TO DE NOVO REVIEW IN A FEDERAL HABEAS CORPUS PROCEEDING

Petitioner urges this court to answer the question left unanswered in *Wright v. West*, 505 U.S.___, 112 S.Ct. 2482, (1992), regarding the proper standard of review in federal habeas corpus proceedings, yet the reasons suggested in that case as cause for reexamination of the holding in *Miller v. Fenton*, 474 U.S. 104, 112 (1985) confirming the de novo review standard, are absent in the context of this case.

In *Wright v. West, supra,* the habeas petition was a *collateral attack on a final judgement of conviction,* alleging that the evidence was insufficient to support a conviction. Ten years after his conviction by a jury, the habeas petition was filed in federal district court, after two rejections upon the merits of the claim by the State Supreme Court. The district court denied the writ, and the Court of Appeals reversed upon reviewing all the evidence presented to the jury.

Here, there is no final judgement of conviction, there has been no rejection of the claim upon the merits by any state appellate court, and no request made of the federal court to review evidence submitted to a jury to determine its sufficiency.

The lack of a final judgement is an important distinction because all members of the court in *Wright v. West, supra,* seemed to agree that, whatever the genesis of the

rule, the Court has "gradually come to treat as settled the rule that mixed constitutional questions are 'subject to plenary federal review' on habeas. *Miller v. Fenton*, 474 U.S. 104, 112 (1985)". *Wright, supra*, 112 S.Ct. at 2489. Yet it is urged that the decision in *Teague v. Lane*, 489 U.S. 288 (1989) conflicts with the de novo review rule. While the merits of this reasoning may be argued (see opinions of Justice O'Connor and Justice Kennedy in *Wright, supra*), it cannot be disputed that *Teague* itself can have no application where there is no final judgement, as the rule under *Teague* is that "a habeas petitioner generally cannot benefit from a new rule of criminal procedure announced *after his conviction has become final on direct appeal.*" *Wright, supra*, 112 S.Ct 2484, 2489, (emphasis added). Even if *Teague* is to cause a modification of the *Miller* rule in certain circumstances, those circumstances cannot be present where, as here, there is no final judgment.

Where there is no final judgment, there can be no diminution of the "State's significant interest in repose for concluded litigation" (*Wright, supra*, 112 S.Ct. at 2491), hence a lessened concern for "deference" exists. Neither is any concern for res judicata or law of the case implicated where federal courts properly intervene prior to a final judgement.[1]

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[1] This is not to say that other concerns are not present when a federal court interferes with a state court criminal proceeding. These concerns are well-embodied in the exhaustion of remedies requirement under 28 U.S.C. 2254 and the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). However, Petitioner has conceded that Mannes exhausted her state court remedies, and has now abandoned the claim formerly made, and resolved against them, that the District Court should have

A final criminal judgement also implies that a judge has ruled on any legal questions presented by the case, and that those rulings have been subject to some type of corrective process or review regarding the merits of those rulings (absent some procedural default). Implicit in the thesis that final state court judgements should be treated with deference is the foundational requirement that alleged state court errors in applying federal law have been subject to a "full and fair" hearing by a state reviewing court. See *Moore v. Dempsey*, 261 U.S. 86, 91, 92. Yet in this case, no state appellate court has even reviewed the Municipal Court Magistrate's ruling on the merits of the Double Jeopardy claim. Where the state has failed to provide an adequate corrective process, (see *Case v. Nebraska*, 381 U.S. 336 (1965), it can hardly complain that the federal court determines the matter de novo.

Petitioner would equate the "considered conclusions of a co-equal state judiciary" (*Miller v. Fenton, supra* 474 U.S. at 112), with the perfunctory, unreasoned and unreviewed ruling of a Municipal Court Magistrate. There is simply no articulable reason to do so. Even under state law, if Mannes were ever to be convicted of murder, the state appellate courts will subject the Double Jeopardy claim to full review.[2] There is no reason why the federal

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abstained under *Younger v. Harris, id.* (See opinion below, page 6881)

[2] Under California law, the denial of a pretrial petition for writ of prohibition or mandate is neither law of the case, nor res judicata when the petition is summarily denied without opinion. "When the court denies a writ petition without issuing an alternative writ, it does not take jurisdiction over the case; it does not give the legal issue full plenary review." *Kowis v.*

courts must defer to a ruling that the state appellate courts must review de novo. Here there is no written opinion by the state court which can serve to guide or inform the federal courts, even though the California Constitution, Article VI, § 14, requires written decisions on appellate causes. And, contrary to the assertion of the Petitioner, the question involved has nothing to do with the interpretation of state *law*, but to the interpretation of written findings, and their legal significance under the Double Jeopardy Clause. The federal courts are in a better position to attach the correct constitutional significance to the ruling than are state court magistrates.

Because the rule of de novo review of mixed constitutional questions has been firmly established, Petitioner bears "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective". *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). While future cases may present circumstances where this burden may be borne, this case does not present concerns sufficient to cause this Court to undertake to examine settled law.

IV. THE VERY NATURE OF THE DOUBLE JEOPARDY CLAIM PRESENTED HERE REQUIRES THAT FEDERAL COURTS REVIEW THE ISSUE WITHOUT DEFERENCE TO A STATE COURT PRETRIAL RULING

The Double Jeopardy Clause protects against multiple trials, as well as double punishment. Pretrial review

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Howard, 4 Cal.3d ___, 92 Daily Journal D.A.R. 15009, (November 5, 1992), *People v. Medina*, 6 Cal.3d 484 (1972).

of colorable double jeopardy claims is therefore necessary to fully vindicate the constitutional right. *Abney v. United States*, 431 U.S. 651 (1977); *Hartley v. Neely*, 701 F.2d. 780, (9th Cir. 1983). Where state remedies are exhausted, federal courts will properly entertain a pretrial habeas petition presenting a colorable double jeopardy claim. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984).

The exhaustion requirement is satisfied "once [a] federal claim has been fairly presented to the state courts". *Picard v. Connor*, 404 U.S. 270, 275 (1971). It is *not* necessary that the state appellate courts actually rule on the merits of the issue, as it is sufficient that the state courts simply have had the opportunity to rule on the merits, but declined to do so.[3]

The result of these rules is that pretrial habeas petitions based upon Double Jeopardy claims constitute a special class of cases wherein the federal district court will sometimes be required to adjudicate the prisoner's Double Jeopardy rights *prior* to any state appellate review. "Deference" to the state appellate process is simply inapplicable where that process has not taken place.

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[3] Petitioner miscites *Turner v. Compoy*, 827 F.2d 526, 529 (9th Cir. 1987) for the proposition that the denial of a pretrial petition is presumed to be on the merits. To the contrary, "The denial of an application for writ of prohibition does not constitute, and cannot be fairly read as, an adjudication on the merits of the claim presented." *Pitchess v. Davis* 421 U.S. 487, 488. See also *People v. Medina*, 6 Cal.3d. 484, 490-492. *Turner, supra*, simply stands for the proposition that an unexplained denial of a writ will not be deemed to be based upon a procedural default.

"Deference" is also inapplicable where the question concerns whether a particular ruling constitutes an acquittal for federal Double Jeopardy purposes. A state court may well find, as a matter of state law, that a ruling was not an acquittal. However the rule is settled that this Court is not bound by such a determination. *Smalis v. Pennsylvania*, 476 U.S. 143, 144, fn. 5 (1986). The reason is that the label given to the ruling under state law is simply irrelevant if "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

> "We of course accept the Pennsylvania Supreme Court's definition of what the trial judge must consider in ruling on a defendant's demurrer. But just as 'the trial judge's characterization of his own action cannot control the classification of the action [under the Double Jeopardy Clause],' *United States v. Scott*, 437 U.S. 82, 96, (1978), (citation omitted), so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding upon us." *Smalis*, 476 U.S. 143, 144, fn. 5.

Since the characterization of a ruling under state law as other than an acquittal is irrelevant under federal Double Jeopardy doctrine, the concept of "deference" to that characterization is inappropriate. When the characterization to which deference is sought is an unreviewed determination of a Municipal Court Magistrate, the thesis suffers further.

V. THE ISSUE OF THE APPROPRIATE STANDARD OF REVIEW IS NOT LIKELY TO BE REACHED BECAUSE THE JUDGEMENT BELOW IS PROPER REGARDLESS OF THE STANDARD OF REVIEW HELD APPLICABLE

In *Wright v. West, supra,* 505 U.S.___, 112 S.Ct 2482, (1992) the question concerning the appropriate standard of review was not reached because the court determined that under any standard, the result below was wrong. In this case, the result below was right, under any standard, and the issue of deference would again evade review.

The issue of whether a federal court should give deference to state court rulings in this case is a false one, since the Court of Appeals did give "deference" to the state court ruling. The opinion below clearly shows that the Court of Appeals did give careful consideration to the ruling of the Municipal Court Magistrate. The opinion quoted the oral ruling and noted that the State had adopted the Magistrate's characterization of the findings as "gratuitous" as part of its argument (Opinion, page 6886). Confronted with the issue of whether the written finding was indeed "gratuitous", the Court of Appeals "deferred" to the California Supreme Court for guidance on whether reasons for a dismissal under the Penal Code Section at issue (Section 1385) are necessary. The indisputable answer is that the statute itself requires that the reasons be entered in the minutes and the California Supreme Court has held this requirement to be mandatory (Opinion, page 6886). Thus the Magistrate's characterization of the trial judge's findings as "gratuitous" was simply wrong under any standard.

Because the trial judge's finding of "insufficient evidence" was not gratuitous, but was the reason for his dismissal, no reasonable judge could find that the ruling could constitute anything other than an "acquittal" for *federal* Double Jeopardy purposes.

Additionally, beyond the fact of the implied acquittal, other aspects of the Double Jeopardy Clause mandate that retrial for murder is barred. Because Mannes prevailed below, she is entitled to urge these meritorious grounds on review, even though they were not passed upon by the Court of Appeals, because they rest on the same facts. See *Thigpen v. Roberts*, 468 U.S. 27 (1984), *Lewis v. Jeffers*, 497 U.S.___ 110 S.Ct. 3092, 3105, fn. 3 (1990) (J. Blackmun dissenting). Each additional ground rests on undisputed facts contained in the record, and is sufficient of itself to support the issuance of the writ without reference to the standard of review.

Without attempting to argue the merits, the additional grounds are summarized as follows. Even if the trial judge's ruling can be characterized as based upon the weight rather than the sufficiency of the evidence, retrial is still barred as a successive prosecution because the order of dismissal terminated the jeopardy that unquestionably attached at the inception of the trial (and which was not terminated merely by the declaration of a mistrial). While the State could have appealed the decision of the judge to dismiss the murder charges as long as it was not held to constitute an acquittal (*United States v. Scott*, 437 U.S. 82 (1978)), it did not. Thus any new attempt to institute a *new* criminal proceeding is an impermissible successive prosecution.

Retrial is also barred under *Grady v. Corbin*, 495 U.S. 508 (1990), in that Mannes was convicted in the first trial for drunk driving causing injury arising out of the same collision. Thus she has been convicted based upon the same conduct which underlies the pending murder charges. She has now completed her prison sentence received for the previous conviction, and further punishment, imposed in a separate proceeding, for the same conduct, violates the Double Jeopardy Clause.

VI. PRACTICAL AND EQUITABLE CONSIDERATIONS COUNSEL AGAINST A GRANT OF CERTIORARI

It would be inequitable to grant certiorari in this case simply to reach the standard of review issue. All five federal judicial officers who have given this matter full review have come to the unanimous decision that the Double Jeopardy Clause bars retrial for murder. The state appellate courts could yet agree. It would be unjust and frustrate the purpose of the Double Jeopardy Clause to require Mannes to once more "run the gauntlet" in these circumstances.

It must also be considered that the trial judge undeniably believed that the interests of justice *did not* require a conviction at the level of murder for the acts committed (see Petition, Appendix D, page 2). The State seeks not justice, but the raw power to attempt to achieve a result which has already been judicially determined to be *against* the interests of justice.

The possibility exists that the matter may become moot in the future. The petition for a writ of mandate/

prohibition, presently pending in the state Court of Appeal, based upon violation of state statutory speedy trial rights, would, if granted, result in dismissal of the currently pending murder charges.

CONCLUSION

For the reasons stated above, Respondent Mannes respectfully urges this Court to deny the petition for certiorari, giving her the protection that the Double Jeopardy Clause promises.

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FILED
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No. 92-467

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOHN V. GILLESPIE, SHERIFF,
PETITIONER,
v.

DIANE HELEN MANNES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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No. 92-467

In the
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JOHN V. GILLESPIE, SHERIFF,
PETITIONER,
v.

DIANE HELEN MANNES,
RESPONDENT.

REPLY TO BRIEF IN OPPOSITION

I.

THIS CASE RAISES IMPORTANT ISSUES REGARDING DOUBLE JEOPARDY

Respondent contends that the double jeopardy issues (issues 1 and 2) involve nothing more than the application of settled principles to particular facts. (Brief in Opposition, page 2.) We disagree. The present case presents legal issues which are unresolved under current law: Whether a dismissal under a discretionary "furtherance of justice" standard can be characterized as an acquittal when the trial court had no legal authority to acquit.

The Ninth Circuit's opinion in the present case conflicts with *United States v. Weinstein* (2nd Cir. 1971) 452 F.2d 704, cert. denied, 406 U.S. 917 (discussed on pages 14-16 of Petition for Writ of Certiorari). In *Weinstein*, the court refused to characterize a dismissal

as an acquittal when the court had no authority to acquit at that stage of the proceedings and disclaimed the intent to acquit. The Ninth Circuit's opinion in the present case conflicts with *Weinstein* by treating a dismissal as an acquittal even though the trial court had no authority to acquit. The trial court in the present case also disclaimed the intent to acquit by denying two acquittal motions before the case was submitted to the jury, and by recognizing that the case could be refiled and retried.

The Ninth Circuit's opinion also conflicts with *Lee v. United States* (1977) 432 U.S. 23, which permits retrial where the trial court dismisses in contemplation of a second prosecution. (See Petition for Writ of Certiorari, pages 13-14.)

Certiorari is also appropriate to resolve the issue of whether a dismissal under a broad "furtherance of justice" standard should be treated as a finding of insufficiency of the evidence as a matter of law.

It is appropriate for the court to grant certiorari in the present case, not to review particular facts, but to resolve conflicting authority and resolve important issues of law. (See Supreme Court Rule 10.1.)

II.

THE ISSUE OF DEFERENCE TO STATE COURT RULINGS IS RIPE FOR REVIEW

Respondent contends that the issue of deference to the state courts' orders was not adequately raised below. (Brief in Opposition, pages 2, 7.) In fact, we discussed a closely related issue by urging the federal courts to respect the state courts' proceedings and rulings by abstaining from issuing a federal writ of habeas corpus. (Return to

Petition for Writ of Habeas Corpus, pp. 9-10; Appellant's Opening Brief (in Court of Appeals), pp. 7-9; Appellant's Reply Brief, p. 1.)

On page 20 of appellant's opening brief, we stated the following:

> The effect of the trial court's ruling is a matter of interpretation of state law which the federal court should follow. The state court in this case has interpreted dismissals under Penal Code section 1385, including the dismissal in this case, as not constituting an insufficiency of the evidence as a matter of law. (Excerpts of Record, p. 18.) The District Court was bound to accept state court interpretations of state law. *Lewis v. Jeffers* (1990) 497 U.S. ___, 111 L.Ed.2d 606, 622-624, 110 S.Ct. 3092.

In Appellant's Reply Brief, we cited *Coleman v. Thompson* (1991) 501 U.S. ___, 115 L.Ed.2d 640, 654, 656, 111 S.Ct. 2546, 2552, 2554, reh. denied, 115 L.Ed.2d 1109, 112 S.Ct. 27, for the proposition that "[f]ederal courts owe respect to the states and should not 'undermine the State's interest in enforcing its laws.'" (The opinion in *Coleman v. Thompson* was issued on June 24, 1991, after Appellant's Opening Brief had been filed.)

Of course, none of the briefs in the district court or Court of Appeals cited *Wright v. West* (1992) 505 U.S. ___, 120 L.Ed.2d 225, 112 S.Ct. 2482, which had not yet been decided. *Wright v. West* was issued on June 19, 1992, after all the briefing in the Ninth Circuit had been completed, and only three days before the Ninth Circuit issued its opinion.

Even if the standard of review had not been discussed in the lower courts, this court would need to consider that issue before

proceeding to the merits of the double jeopardy claim. In every case in which certiorari is granted, the court must employ some standard of review of the merits, even if that standard is not explicitly stated in the court's opinion. It is appropriate for this court to consider the standard of review on certiorari because the issue is at least implicitly involved in every case before the court.

Respondent mischaracterizes our position. Contrary to respondent's assertions (Brief in Opposition, p. 5), we do not claim that the federal court is *bound* by the state court's interpretations. Our proposal is much more modest: Where, as here, the application of the double jeopardy clause to state court rulings has been presented to the municipal court, superior court, California Court of Appeal, and California Supreme Court, the unanimous ruling of these courts is entitled to deference and should not be ignored by federal courts on habeas corpus. The double jeopardy issue was fully briefed to each of the state courts, and we must presume that each court carefully considered the issue before ruling against respondent. Our argument does not rely solely on the municipal court's order, but also upon the orders of the superior court, California Court of Appeal and California Supreme Court.

As respondent points out (Brief in Opposition, p. 6), our brief in the Ninth Circuit urged a de novo review. This is the correct standard for review of a district court judgment issuing a writ of habeas corpus. *Mitchell v. Goldsmith* (9th Cir. 1989) 878 F.2d 319, 321. This is a matter of procedure within the federal system and is separate from the federalism issue of deference by federal courts to state court interpretations.

III.

CERTIORARI IS APPROPRIATE TO RESOLVE THE ISSUE OF DEFERENCE TO STATE COURTS ON MIXED CONSTITUTIONAL QUESTIONS

Respondent argues that modification of the plenary standard of review under *Miller v. Fenton* (1985) 474 U.S. 104, 112, is not appropriate in cases where there is no final judgment. We disagree. *Teague v. Lane* (1989) 489 U.S. 288 "implicitly questioned" the standard of review by raising the related question of what is "dictated by precedent" for purposes of retroactivity. See *Wright v. West, supra*, 120 L.Ed.2d at pp. 237-238 and fn. 8, 112 S.Ct. at pp. 2489-2490 and fn. 8. It is also clear that there are some different rules for direct appeal and habeas corpus. *Id.*, 120 L.Ed.2d at pp. 238-239, 112 S.Ct. at pp. 2490-2491. But the issue of standard of review is not limited to cases with retroactivity issues or which follow a conviction. *Teague* was an impetus for the court's reexamination of precedent in *Wright v. West*, but the court also discussed other cases which did not involve retroactivity. 120 L.Ed.2d at pp. 233-237, 112 S.Ct. at pp. 2486-2489.

The state has no less of an interest in a pending case than in a completed case. Our interest here is not "in repose for concluded litigation" (*Id.*, 120 L.Ed.2d at p. 239, 112 S.Ct. at p. 2491), but in being permitted to proceed with continued litigation. A writ of habeas corpus which prohibits a retrial "intrudes on state sovereignty" as much as writ which vacates a conviction.

Similar issues of federalism are currently before the court in *Williams v. Withrow* (6th Cir. 1991) 944 F.2d 284, cert. granted (Apr. 20, 1992) 118 L.Ed.2d 386, 112 S.Ct. 1664 (No. 91-1030). The issue in

that case is whether state court *Miranda* rulings are cognizable on federal habeas corpus.

We disagree with respondent's claims that no state appellate court has reviewed the merits and that the state has failed to provide an adequate corrective process. (Brief in Opposition, p. 10.) The municipal court judge addressed the merits in his ruling. The superior court issued an alternative writ and considered the prosecution's Return before ruling. (State Court Record, pp. 145-172.) While a writ of mandate may be referred to as a "discretionary" writ, both the superior court and California Court of Appeal would have been required to issue the writ if the petition stated a legitimate claim for relief and complied with the procedural requirements. *Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 203, 37 Cal.Rptr. 425, 390 P.2d 193. Respondent has not suggested that her writ petitions contained some procedural defect which would have barred relief.

We cannot conclude from the absence of written opinions by the California Court of Appeal and California Supreme Court that these courts did not consider the petitions or that the state has failed to provide a corrective process. Under California law, written opinions are not required for appellate court orders which summarily deny a petition for writ of mandate or prohibition because the matter is not a "cause" unless an alternative writ or order to show cause is issued. *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178 and fn. 5, 203 Cal.Rptr. 626, 681 P.2d 893.

Respondent argues that the "finding" of insufficient evidence must be an acquittal because it was the reason for the dismissal. (Brief in Opposition, p. 15.) As explained in our petition, the issue is not that simple. The order would have constituted an acquittal only if the court

found the evidence insufficient *as a matter of law* rather than under a discretionary "thirteenth juror" standard. (See Petition for Writ of Certiorari, pp. 7-10.) The federal courts should give deference to the state court's interpretation of a dismissal order in light of the California dismissal statute (Penal Code section 1385), the denied acquittal motions (Penal Code section 1118.1) and the Double Jeopardy Clause.

Contrary to respondent's contentions (Brief in Opposition, p. 15), the fact that the retrial would be on a second information rather than on the first information does not constitute double jeopardy. *People v. Lo Cigno* (1965) 237 Cal.App.2d 470, 474, 46 Cal.Rptr. 918.

Respondent also attempts to resurrect the issue of *Grady v. Corbin* (1990) 495 U.S. 508. (Brief in Opposition, p. 16.) The Ninth Circuit specifically held that respondent was barred from raising this issue because it had not been presented to the state courts or federal district court. *Mannes v. Gillespie* (9th Cir. 1992) 967 F.2d 1310, 1316, fn. 6, reprinted as Appendix A to Petition for Writ of Certiorari. Moreover, as we explained in Appellant's Reply Brief in the Ninth Circuit, *Grady v. Corbin* is distinguishable. In *Grady v. Corbin*, the prosecution filed traffic violations and homicide charges in separate actions and failed to "combine all charges into a single prosecution." 495 U.S. at p. 512, fn. 3. The court noted that "the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question." *Id.* at p. 524. In the present case, the Vehicle Code charges and murder charges were filed in a single accusatory pleading. Upon the jury's resolution of only some of the counts, the People were entitled to retry the defendant for the unresolved charges. *People v. James* (1980) 102 Cal.App.3d 108, 111, 162 Cal.Rptr. 263; *Selvester v. United States* (1898) 170 U.S. 262, 269.

IV.

JUSTICE WOULD BEST BE SERVED IF RESPONDENT WERE RETRIED FOR MURDER

Respondent argues that it would be inequitable to grant certiorari because respondent has prevailed in the lower courts. (Brief in Opposition, pp. 3, 16.) Of course, it is to respondent's benefit to maintain the status quo and avoid retrial. But there are also equities on behalf of the prosecution. Justice to the prosecution would best be served by allowing a complete opportunity for a jury verdict as to whether respondent is guilty of murder. Justice to society includes trying and punishing drunk drivers who kill innocent people.

Respondent argues that all five federal judicial officers in this matter concluded that double jeopardy barred retrial. (Brief in Opposition, p. 16.) The appropriateness of certiorari should not depend on a numerical count of judges in the lower courts. If that were the case, then this court should consider the twelve state judicial officers of the municipal court, superior court, California Court of Appeal and California Supreme Court who unanimously declined to grant relief on double jeopardy grounds.

The trial judge declined to reset the case for trial, but he did not intend to preclude retrial. He specifically recognized the right of the prosecution to refile the murder charges and the opportunity for a new trial. (Petition for Writ of Certiorari, Appendix D, p. 4.)

Finally, respondent argues that the case may become moot if the California Court of Appeal grants a writ. (Brief in Opposition, pp. 2-3, 16-17.) The stay of the Ninth Circuit precludes the state courts from

acting pending disposition of the instant certiorari petition. (See Brief in Opposition, pp. 1-2.) While a discussion of the merits of the Court of Appeal petition is beyond the scope of the present proceedings, it is our position that the petition is without merit. The mere possibility that respondent may later prevail in the lower courts should not prevent this court from resolving important issues of law. It was respondent who initiated the proceedings in federal court before the retrial in state court could occur; respondent cannot now complain that the proceedings may become moot if respondent later prevails in the state court.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, we respectfully request that certiorari issue.

Respectfully submitted,

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